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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
SIXTH APPELLATE DISTRICT

IN RE A. D., a Person Coming Under the  
Juvenile Court Law.

H033722  
(Santa Cruz County  
Super. Ct. No. J21299)

THE PEOPLE,

Plaintiff and Respondent,

v.

A. D.,

Defendant and Appellant.

The juvenile court placed appellant A. D. on probation after it found true allegations that she had committed felony driving under the influence with injury (Veh. Code, § 23153, subd. (a)), felony driving with a .08 percent or more blood alcohol level with injury (Veh. Code, § 23153, subd. (b)), misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)), and misdemeanor providing false information to a peace officer (Veh. Code, § 31). The court also suspended her ability to retain or obtain a driver's license for three years. Although an unsigned dispositional order stated that the court had declared the two Vehicle Code section 23153 offenses to be felonies, the court made no such declaration at the dispositional hearing or at any other hearing.

On appeal, appellant contends that the juvenile court erroneously failed to declare whether the Vehicle Code section 23153 offenses were felonies or misdemeanors and erred in suspending her ability to obtain or retain a driver's license for three years rather than for one year. We conclude that a remand is required for the court to make the necessary declaration and for the court to modify its suspension to reflect a two-year term rather than a three-year term.

### **I. Background**

Appellant was driving with a .20 percent blood alcohol level when the vehicle struck a power pole. The passenger side of the vehicle was heavily damaged, and appellant's passenger suffered serious injuries. A petition was filed alleging that appellant had committed felony driving under the influence with injury (Veh. Code, § 23153, subd. (a)), felony driving with a .08 percent or more blood alcohol level with injury (Veh. Code, § 23153, subd. (b)), misdemeanor driving without a license (Veh. Code, § 12500, subd. (a)), and misdemeanor providing false information to a peace officer (Veh. Code, § 31).

After a contested jurisdictional hearing, the court found all of the allegations true. At the dispositional hearing, the court placed appellant on probation and suspended her "ability to have or keep your driver's license for three years." The court stated that appellant's "maximum exposure is three years, four months." The court did not explicitly state orally that the Vehicle Code section 23153 counts were felonies rather than misdemeanors. The unsigned minute order from the dispositional hearing contains a checked checkbox that reads: "The following counts may be considered a misdemeanor or a felony. The court finds the child's violation of:" Listed below this text are the four counts with checkboxes for "Misdemeanor" and "Felony" after each count. The felony checkboxes are checked for the two Vehicle Code section 23153 counts. This unsigned

minute order also states that appellant's driver's license is suspended for a period of three years. Appellant filed a timely notice of appeal.

## **II. Discussion**

### **A. Declaration of Felony Or Misdemeanor Status**

Appellant contends that a remand is required because the juvenile court failed to expressly declare the Vehicle Code section 23153 offenses to be either felonies or misdemeanors.

These two offenses, first-time violations of Vehicle Code section 23153, were alternatively punishable as felonies or misdemeanors. (Veh. Code, § 23554.) "If the minor is found to have committed an offense which would in the case of an adult be punishable alternatively as a felony or a misdemeanor, *the court shall declare* the offense to be a misdemeanor or felony." (Welf. & Inst. Code, § 702, italics added.) Here, the juvenile court made no declaration at the jurisdictional hearing or at the dispositional hearing that the two Vehicle Code section 23153 offenses were felonies rather than misdemeanors.

In *In re Manzy W.* (1997) 14 Cal.4th 1199 (*Manzy*), the California Supreme Court held that a remand was required where the juvenile court had failed to make an express declaration as to whether the offense was a felony or a misdemeanor. In *Manzy*, the offense had been alleged as a felony, and Manzy had admitted the allegation. (*Manzy*, at p. 1202.) The juvenile court had committed Manzy to the California Youth Authority and set his maximum term of physical confinement at three years, a felony-level term. (*Manzy*, at p. 1203.) Nevertheless, the California Supreme Court held that Welfare and Institutions Code section 702's requirement of an express declaration required a remand. The court's analysis noted that a reference to the offense as a felony in the minutes of the dispositional hearing would not obviate the need for an express declaration by the court. (*Manzy*, at pp. 1207-1208.)

In *Manzy*, the California Supreme Court pointed out that a remand was not “‘automatic’” whenever the juvenile court failed to make an express declaration. (*Manzy*, *supra*, 14 Cal.4th at p. 1209.) “[T]he record in a given case may show that the juvenile court, despite its failure to comply with the statute, was aware of, and exercised its discretion to determine the felony or misdemeanor nature of a wobbler. In such case, when remand would be merely redundant, failure to comply with the statute would amount to harmless error. We reiterate, however, that setting of a felony-length maximum term period of confinement, by itself, does not eliminate the need for remand when the statute has been violated. The key issue is whether the record as a whole establishes that the juvenile court was aware of its discretion to treat the offense as a misdemeanor and to state a misdemeanor-length confinement limit.” (*Manzy*, at p. 1209.)

The Attorney General concedes that the juvenile court failed to make an express declaration at the hearings regarding the felony or misdemeanor status of these two offenses. He claims that the required express declaration can be found in the unsigned dispositional order in the clerk’s transcript. This unsigned order does contain an express statement, albeit by means of a checkbox, that the juvenile court was aware of its discretion to classify these offenses as felonies or misdemeanors and exercised that discretion by declaring them to be felonies.

On this record, we are compelled to reject the Attorney General’s reliance on the unsigned order. “The [clerk’s] minutes typically represent the clerk’s summary impression of the court’s ruling. Absent evidence that the judge himself reviewed and approved the wording of the minutes, we must assume that his actual reasoning is that which he stated personally on the oral record.” (*People v. Gonzalez* (1990) 51 Cal.3d 1179, 1239.) Although the document in our record purports to be an order rather than the clerk’s minutes, it was obviously prepared by the clerk, and, because it is unsigned and there is no evidence in our record that the judge reviewed or approved it, it simply cannot amount to an *express declaration by the court*. At most, the presence of this unsigned

order in the record raises an inference that the judge *may have* made the requisite declaration.

The Attorney General's reliance on *In re Robert V.* (1982) 132 Cal.App.3d 815 (*Robert V.*) is misplaced. In *Robert V.*, the juvenile court explicitly postponed a determination of misdemeanor or felony status and subsequently issued a *signed* order declaring the offense to be a felony. (*Robert V.*, at p. 823.) Here, the juvenile court itself never mentioned the determination of misdemeanor or felony status, and the order declaring the offenses to be felonies was unsigned.

We will remand this matter to ensure that the judge himself makes the required discretionary decision as to felony or misdemeanor status and makes the requisite declaration.

### **B. License Suspension**

Appellant contends that the term of the license suspension should have been one year rather than three years.<sup>1</sup> The Attorney General maintains that the court was authorized to impose a three-year suspension.

Appellant asserts that the juvenile court erred because her driver's license could be revoked under Vehicle Code section 13352.3 for only one year rather than three years. When a minor is found to have violated Vehicle Code section 23153, "the department immediately shall revoke the privilege of [the minor] to operate a motor vehicle" and "[t]he term of the revocation shall be until the person reaches 18 years of age, for one year, or for the period prescribed for restriction, suspension, or revocation specified in subdivision (a) of Section 13352, whichever is longer." (Veh. Code, § 13352.3, subds. (a), (b).) Because appellant's Vehicle Code section 23153 violations were first-

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<sup>1</sup> Appellant did not have a driver's license, and the juvenile court actually suspended her ability to obtain a license. The difference is immaterial here.

time violations, the revocation period under Vehicle Code section 13352, subdivision (a) is one year. (Veh. Code, § 13352, subd. (a)(2).) Appellant was 17 years old when she committed the offense and 18 years old at the time of disposition. Thus, Vehicle Code section 13352.3 authorized the Department of Motor Vehicles (the DMV) to revoke appellant's license for just one year.

The Attorney General counters that Vehicle Code section 13352.3's provisions regarding the *revocation* of a license by *the DMV* are irrelevant here because Vehicle Code section 13202.5 authorized *the juvenile court* to *suspend* appellant's license for three years. "For each conviction [or juvenile adjudication] of a person for an offense specified in subdivision (d) [including a violation of Vehicle Code section 23153], committed while the person was under the age of 21 years, but 13 years of age or older, the court shall suspend the person's driving privilege for one year. If the person convicted does not yet have the privilege to drive, the court shall order the department to delay issuing the privilege to drive for one year subsequent to the time the person becomes legally eligible to drive. However, if there is no further conviction for an offense specified in subdivision (d) in a 12-month period after the conviction, the court, upon petition of the person affected, may modify the order imposing the delay of the privilege. For each successive offense, the court shall suspend the person's driving privilege for those possessing a license or delay the eligibility for those not in possession of a license at the time of their conviction for one additional year." (Veh. Code, § 13202.5, subd. (a).)

Appellant contends that Vehicle Code section 13202.5 does not require the suspension of her driving privilege for more than *one* year because her *two* Vehicle Code section 23153 violations were not "successive." Her contention misconstrues Vehicle Code section 13202.5, subdivision (a) and this court's decision in *In re Melchor P.* (1992) 10 Cal.App.4th 788 (*Melchor P.*) In *Melchor*, this court construed *the first two sentences* of Vehicle Code section 13202.5, subdivision (a) and concluded that this

language required the imposition of a one-year suspension *for each current offense*. (*Melchor*, at pp. 791-795.) The portion of Vehicle Code section 13202.5, subdivision (a) that concerns “each successive offense” was not at issue in *Melchor*, as the minor had committed three current offenses and received a three-year suspension. (*Melchor*, at p. 791.) Appellant has two current qualifying offenses, so the juvenile court was plainly authorized by Vehicle Code section 13202.5 to impose a two-year suspension.<sup>2</sup>

We are left with the fact that Vehicle Code section 13202.5 authorized a *two-year* suspension, but the juvenile court imposed a *three-year* suspension. The Attorney General contends that the three-year suspension was proper as a term of appellant’s probation. This contention lacks merit.

The Attorney General relies on *In re Tanya B.* (1996) 43 Cal.App.4th 1 (*Tanya B.*) to support the proposition that a license suspension for longer than authorized by statute

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<sup>2</sup> In her *reply* brief, appellant argues *for the first time* that the juvenile court was precluded from imposing a suspension of more than one year because a multi-year suspension would amount to multiple *punishment* for a single incident in violation of Penal Code section 654. She relies on *People v. Duarte* (1984) 161 Cal.App.3d 438 (*Duarte*) and *People v. Conner* (1986) 176 Cal.App.3d 716 (*Conner*).

In *Duarte*, the Fifth District Court of Appeal did not explicitly consider whether Penal Code section 654 was intended to apply to *administrative consequences*, but the court prohibited the future use of a second drunk driving conviction for “penal *and administrative purposes*” under Penal Code section 654. (*Duarte, supra*, 161 Cal.App.3d at pp. 447-448, italics added.) In *Conner*, the Fifth District followed its decision in *Duarte*. (*Conner, supra*, 176 Cal.App.3d at pp. 718-719.) In contrast, in *Fearn v. Zolin* (1992) 9 Cal.App.4th 1756 (*Fearn*), the Fifth District, without mentioning *Duarte* or *Conner*, held that “[a] license suspension is not among the punishments listed in Penal Code section 15 and thus is not a penal sanction within the meaning of Penal Code section 654.” (*Fearn*, at p. 1762.) In *Fearn*, the contention at issue was whether a person could be subjected to both administrative and criminal licensure suspension for the same act. (*Fearn*, at p. 1761.) Appellant does not address any conflict between *Fearn* and *Duarte*.

Because appellant failed to raise this issue in her opening brief, thereby precluding the Attorney General from having an opportunity to respond to it, we decline to address this issue. (*Reichardt v. Hoffman* (1997) 52 Cal.App.4th 754, 763-765.)

was proper as condition of probation. In *Tanya B.*, the 17-year-old minor admitted a single count of driving under the influence. (*Tanya B.*, at p. 4.) The court placed her on probation “with a number of conditions, including that she not drive until the age of 21 years.” (*Ibid.*) On appeal, the minor challenged the condition that she not drive for nearly four years. She claimed that Vehicle Code section 13202.5 restricted the court to suspending her license for one year, and the court was therefore prohibited from precluding her from driving for nearly four years as a condition of probation. (*Tanya B.*, at p. 5.) After a brief analysis of Vehicle Code section 13202.5, the Second District Court of Appeal asserted that “[t]he fact that section 13202.5 mandates a one-year term does not mean that the juvenile court cannot impose a longer term, as urged by appellant.” Noting that the juvenile court had jurisdiction over the minor until the age of 21, and the court concluded that the real question was whether the court abused its discretion in fashioning this probation condition. (*Tanya B.*, at p. 7.) It found no abuse of discretion. (*Tanya B.*, at pp. 7-8.)

The First District Court of Appeal disagreed with *Tanya B.* in *In re Colleen S.* (2004) 115 Cal.App.4th 471 (*Colleen S.*). The First District pointed out that *Tanya B.* did not consider Vehicle Code section 13203, which plainly conflicted with *Tanya B.*’s reasoning. (*Colleen S.*, at p. 475.) Vehicle Code section 13203 provides: “In no event shall a court suspend the privilege of any person to operate a motor vehicle or as a condition of probation prohibit the operation of a motor vehicle for a period of time longer than that specified in this code. Any such prohibited order of a court, whether imposed as a condition of probation or otherwise, shall be null and void, and the department shall restore or reissue a license to any person entitled thereto irrespective of any such invalid order of a court.” (Veh. Code, § 13203.) As Vehicle Code section 13203 invalidates any license suspension or condition of probation that exceeds the length specified in the Vehicle Code, we conclude that a probation condition may not

validly prohibit the use of a motor vehicle for a period longer than that specified in Vehicle Code section 13202.5.

Since the Vehicle Code authorizes only a two-year suspension, the appropriate remedy is to direct the juvenile court to modify its order to reflect a two-year suspension rather than a three-year suspension.

### **III. Disposition**

The juvenile court's order is reversed. On remand, the juvenile court shall (1) exercise its discretion to declare each of the Vehicle Code section 23153 offenses to be either a felony or a misdemeanor and, if necessary, recalculate the maximum time of confinement, and (2) modify its suspension order to reflect a two-year suspension rather than a three-year suspension.

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Mihara, J.

WE CONCUR:

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Bamattre-Manoukian, Acting P. J.

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Duffy, J.